



Antitrust Insights Webinar Series

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Antitrust at Work: Latest Developments in Enforcement Over No-Poach and Employee Non-Compete Agreements

Joseph O'Keefe, Partner
Colin Kass, Partner
Erica Jones, Associate
Reut Samuels, Associate

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No-Poach in a Nutshell



No-Poach Agreements

- Arrangements *between employers* whereby each agrees not to recruit the other's employees
- Accomplishes many of the same goals as a non-compete, but the covenant is made with other competitors
- Forces employee retention by eliminating comparable work in the market
- Can take the form of more subtle agreements
- Subject to criminal and civil violations

Do Not Touch



What is the Standard?

- Rule of Reason – On balance, was it reasonable?
 - 15 U.S. Code § 4302 - Conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition
 - **Who gets this treatment?**
 - Presumptively applied.
- *Per Se* Treatment – Do not pass go, do not collect \$200.
 - A *per se* violation requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice.
 - **Who gets this treatment?**
 - “Naked” agreements
 - Price fixing, bid rigging, and market allocation
 - Direct competitors
 - Agreements with limited potential for pro-competitive benefit

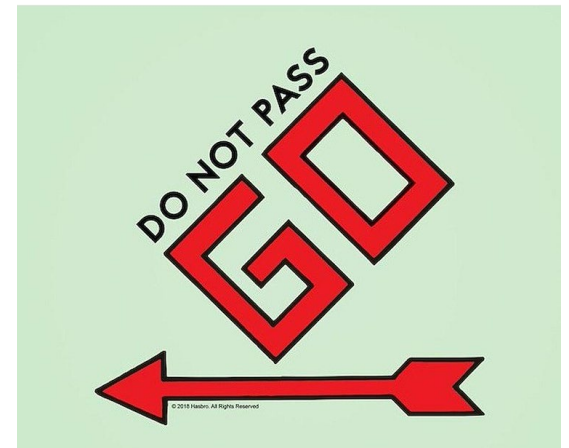


Image via Hasbro

Contractor Hypothetical: Planes, Trains, and Automobiles

The “Nuts & Bolts”

- The PTA Company makes you guessed it—planes, trains, and automobiles.
- PTA relies on its own engineers, contract engineers, and outsourced engineers.
- PTA outsources projects to engineers from various shower curtain ring companies (the “Contractor Companies”), supplementing and performing overlapping functions with engineers employed directly by PTA.
- PTA makes an agreement with the Contractor Companies not to poach their engineers, and vice versa. Considering the contractual relationship between the companies, is this legal?

Are they Competitors?

- The Plane, Train, and Automobile Company outsources business to the Contractor Companies.
- However, there is another market at play.
 - The focus of analyzing contractor relationships must be on *the labor market*
- The companies are indeed competitors at the same level of the market structure, allocating the labor market.



Image via [Paramount Pictures](#)

We Have Seen This in the *Raytheon* Case

- Which asked if the relationship between the contracting parties was horizontal or vertical?
- **Raytheon Defendants:** “Pratt & Whitney manufactures engines and uses the Outsourcing Defendants as upstream suppliers that provide labor to design, manufacture, and service [Pratt & Whitney’s] aerospace products.”
- **Raytheon Plaintiffs:** “The market actually at issue here is the labor market for Aerospace Workers, not the market for aircraft engines or the greater aerospace industry at large.”

“...The alleged conspiracy is one of market allocation, in which Defendants supposedly divided the labor of Aerospace Workers amongst themselves, in a horizontal fashion... Rather, the present action pertains to an alleged conspiracy to restrain competition in the aerospace labor market; all Defendants, including Pratt & Whitney, participate in that market horizontally, and they are all alleged to have participated in the market division conspiracy horizontally.”

Brand Competition: Make it Luxury

Are These Brands Competitors?



Are These Brands Competitors?



“...They received extensive training on **service, selling, and product-knowledge** and helped to maintain the image of the brand by creating an **atmosphere of exclusivity and opulence.**”

Saks Carries Them All



Are They Collaborators?

“...Plaintiffs state that Saks and the Brand Defendants are competitors, but they also acknowledge that Defendants collaborate, that the Brand Defendants “sell their goods and apparel through department stores (including Saks)” and through “concessions (including concessions at Saks stores).” Such a relationship is not the same as one between “naked” competitors.

Restraints that accompany such *collaborative business relationships* are generally ***not afforded per se treatment.***

Franchises: And Keep it Luxury

“Un petit plaisir” – That is, a Little Luxury.



Clip [via](#) [Emily In Paris](#) (Netflix)

Macaroon Stuffers at French Fast Food Franchise

- **The Employer:** A popular French Fast Food Franchise (“F4”), known for its French Fries and Fresh Macaroons.
- **The Potentially Anticompetitive Act:** The Franchise agreements contain no-poach provisions
 - Employees say the provisions stifle competition and depress wages.
 - The provisions bar franchisees from hiring employees who worked at corporate stores for six months after they left their jobs.



The Franchise Agreement is Key



- Based on current caselaw, this scenario likely falls in the “great in-between” of restraints subject to the rule of reason—not the *per se* rule
- The underlying franchise agreements serve a procompetitive purpose in increasing the output of fries and macarons.
- Courts do not have enough experience with no-poach provisions in franchise agreements to “predict with confidence that they must always be condemned.”

Application of the Rule of Reason

- Under the Rule of Reason, the Court would ask whether plaintiffs—the macaroon stuffers—are able to allege either a relevant market or market power.
- **Relevant Market:** As narrow as F⁴? Or fast food outlets more generally?
- **Is macaroon stuffing a skilled job?**
 - *Employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move.*
- Similar facts existed in *Deslandes v. McDonald's USA LLC*. The court noted:
 - “Within ten miles of Turner's home were 253 quick-serve restaurants. Accordingly, Turner cannot plausibly allege that defendants had market power in the relevant market in which Turner sold her labor. Without market power, defendants could not suppress plaintiffs' wages; another buyer would step in to pay plaintiffs more.”
- Plaintiffs in *Deslandes* appealed to the 7th Circuit, where the FTC and DOJ filed an amicus brief arguing the Judge applied the wrong standard.

Non-Compete Agreements

Key Features of FTC Proposed Rule

- FTC’s January 5 proposed rule mandates the following:
 - **1. Bans most “worker” non-competes.**
 - Narrow Sale of Business exception
 - Carve out for non-competes between franchisors and franchisees.
 - Broad definition of “workers.”
 - Applies to all businesses within the FTC’s jurisdiction (Some businesses are not within FTC jurisdiction, e.g. banks, savings and loan associations, federal credit unions, airlines, telecom providers.)
 - **2. Bans agreements that can be construed as *de facto* non-competes.**
 - States that a vaguely defined “functional test” will apply to assess whether a contractual term in a prohibited non-compete.
 - **3. Voids existing non-competes.**
 - Requires employers to rescind existing non-compete agreements no later than the Compliance Date (180 days after final Rule is published) and provide notice to workers that their non-compete clauses are no longer in effect and may not be enforced.
 - Individualized written notices must be provided to each currently employed worker, as well as former workers for whom the employer retains contact information, within 45 days after rescinding the non-compete clause.
 - Safe harbor for employers who use the model notice language provided in the Proposed Rule.

Key Features of FTC Proposed Rule (cont'd)

- FTC's January 5 proposed rule mandates the following: (cont'd)
 - **4. Employers may still prohibit competition during employment.**
 - **5. Employers may still use common contractual restrictions such as:**
 - non-disclosure or confidentiality agreements (as long as they are not a *de facto* non-compete)
 - agreements for the repayment of training costs
 - agreements restricting a worker from soliciting other workers
 - **6. No private right of action.**

FTC Authority

- Does the FTC have authority to issue this rule?
 - FTC has authority to prevent unfair competition under Section 5 of the FTC Act ... but,
 - And it has some rule-making authority.
 - But less clear whether it has rule making authority over competition matters, as opposed to deceptive matters.
 - FTC Act § 6(g) (granting power only to “make rules ... for the purpose of carrying out the provisions of [the FTC Act]”).
 - FTC Act § 57a (granting power to make rules relating to “unfair or deceptive” act, preserving ability – but not authorizing – rules for “unfair methods of competition.”).
 - No specific rule-making process or relief for “unfair methods of competition” rules.
 - “Major Question” Doctrine may limit rule making powers
 - In *West Virginia v. EPA* (SCOTUS), the Supreme Court held that an administrative agency must have clear congressional authorization before it regulates matters of major economic significance.

Timing

- Proposed rule will not become final until after the close of a 60-day public comment period – (currently the comment period is set to end on March 20).
 - Expect extensive comments
 - Expect legal challenges

Impact on State Law

- The proposed Rule states that it would supersede all existing state laws and regulations regulating non-competes to the extent they are inconsistent with the Rule.
 - Not clear if an agency – as opposed to Congress -- has the *power* to pre-empt state law.
- Forty-Seven States currently allow and enforce non-compete agreements for at least some categories of workers.
 - Many states have begun enacting laws that impose an income threshold for non-competes.
 - Some state legislatures are currently considering legislation that would ban most non-competes in those states (e.g. New York, New Jersey, Connecticut, Minnesota)
- Three states ban most non-competes.
 - California, North Dakota, Oklahoma
- A growing trend of increased scrutiny of non-competes by courts in states where they are permitted.

Implications

- Shore up confidentiality policies.
- Provide routine training regarding access to, use of, and treatment of confidential information.
- Ensure confidential information is retrieved and destroyed for departing employees.
- Limit access to confidential information.
- Incentivize employees to remain employed.

What if the Proposed Rule Never Takes Effect?

- Likelihood of increased Section 5 activity by the FTC.

FTC Files Suits to Stop Companies from Making Workers Sign Non-Compete Restrictions

- On **January 4, 2023**, the FTC invoked its recently expanded Section 5 authority and brought actions against three companies to halt their allegedly unlawful use of non-competes.
- FTC said Prudential, Michigan-based security companies, "exploited their superior bargaining power against low-wage security guards."
 - Prudential required workers to sign contracts that prevented them from working for competing businesses within 100 miles of their job site for 2 years after leaving the company and required employees to pay \$100,000 if they violated the company's clause.
- The FTC also claimed O-I Glass Inc. and Ardagh Group S.A. imposed 1-2 year non-competes on thousands of workers who worked in various roles, locking up highly specialized workers and reducing labor mobility in a highly-concentrated sector of the economy.

Proposed Federal Legislation to Ban Non-Competes

- Workforce Mobility Act
 - Bipartisan – Bill reintroduced in both House and Senate
 - Previously introduced in 2018, 2019 and 2021.
 - Never made it past the committee process.
 - **Could this time be different?**
 - Seeks to prohibit the enforcement of post employment non-competes
 - Limited exceptions.
 - Senior executives and owners
 - Sale of business.
 - Dissolution of partnership.
 - Even with exceptions duration limited to one year.
 - Expressly recognizes and protects confidentiality agreements protecting trade secrets.
 - Silent as to non-solicitation clauses.
 - Private right of action.

Speakers



Colin Kass
Partner, Antitrust
ckass@proskauer.com



Joseph O'Keefe
Partner, Labor & Employment
jokeefe@proskauer.com



Erica Jones
Associate, Antitrust
ejones@proskauer.com



Reut Samuels
Associate, Antitrust
rsamuels@proskauer.com



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